United States Postal Service and American Postal Workers Union, Local No. 380, AFL-CIO. Cases 28-CA-19148(P), 28-CA-19149(P), 28-CA-19327(P)

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 8, 2004, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order as modified and set forth in full below.[3]

We affirm the judge's broad injunctive language, enjoining the Respondent from "in any other manner" violating the employees' Section 7 rights. For the reasons set forth in our decision today in *Postal Service*, 345 NLRB No. 25 (2005), we do not agree with our dissenting colleague's contention that a broad order in this case is inappropriate under *Hickmott Foods*, 242 NLRB 1357 (1979) or *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941). We specifically note that shortly before the Respondent's refusals to provide information here, the U. S. Court of Appeals for the Tenth Circuit had issued a broad order against the Respondent based upon a settlement agreement resolving information request violations occurring at the Respondent's Albuquerque facilities. (*NLRB v. USPS*, Case No, 02-9587 (unpub. consent judgment entered Jan. 8, 2003)). Although that order was in conjunction with a settlement agreement, that fact does not diminish the impact of the order. A court decree is binding, whether it be the product of litigation or consent. It does not lose effectiveness or significance simply because it was entered upon consent. Similarly, even if the conduct involved in the Tenth Circuit case was not "severe," the fact is that the Respondent agreed to a broad order and the court entered it.

We also note that the Respondent here unlawfully threatened, disciplined, and discharged a union steward in retaliation for his union activity, including his filing of information requests. The latter conduct is the very conduct which the previous order sought to remedy. We disagree with the dissent's implicit contention that the Respondent's unlawful actions were somehow mitigated by the fact that the employee against whom the Respondent discriminated was a union steward who pursued his

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] There are no exceptions to the judge's findings that the Respondent committed violations of Sec. 8(a)(3) of the Act by taking adverse actions, culminating in discharge, against union steward John Orlovsky because of his union activities and violated Sec. 8(a)(1) by threatening employees with reprisals because of their union activities, and by telling employees that the Respondent discharged Orlovsky because of his union activities. We note that the judge, in discussing the adverse action violations (II, D, 2, (d), par. 10 of her decision), inadvertently misstated the Board's holding in *Hicks Oils & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). The Board there held that in cases where the General Counsel has made a prima facie showing that an adverse action was motivated by the employee's protected activities, the respondent cannot carry its burden of persuasion by merely showing that it had a legitimate reason for taking the action.

The judge found, and we agree, that the Respondent violated Sec. 8(a)(1) on September 9, 2003, and December 4, 2003, by refusing to permit Orlovsky to speak with his union representative and on December 4, 2003, by failing to notify Orlovsky and his union representative of charges prior to an investigatory interview. We reject the Respondent's contention that Orlovsky's status as a union steward negates his right as a union-represented employee to the assistance of a union representative during an investigatory interview. See *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982) (right to assistance of union representative during investigatory interview applies to union steward "regardless of his knowledge of labor law and participation in the grievance procedure").

In finding the violation with respect to the December 4, 2003, incident, Member Schaumber notes that the Respondent does not contest that the collective-bargaining agreement requires it to provide notice of charges prior to an investigatory interview.

We do not pass on the allegation that, on September 5, 2003, the Respondent denied union representation to an employee during an investigatory interview. Assuming arguendo that the allegation was meritorious, we believe that paragraph 1(b) of our order remedies such a violation. That is, the order against the denial of the rights of union representation would include any future total denials of representation.

[3] In order to fully remedy the violations found, we modify the judge's recommended Order by revising pars. 1(b) and 1(i) and by adding a new par. 2(d).

The judge's recommended Order requires posting at all Respondent facilities in Albuquerque. However, the Respondent's unfair labor practices regarding Orlovsky occurred at the Vehicle Maintenance Facility (VMF). The Respondent's unfair labor practices pertaining to information requests arose at the Auxiliary Service Facility (ASF) and the main plant. Accordingly, posting the notice at the VMF, the ASF, and the main plant will insure that all employees who were affected by the Respondent's unfair labor practices will have an opportunity to read the notice

duties zealously. There is no evidence here that the steward's actions crossed the line into unprotected activity.

We also disagree with the dissent's assertion that the Respondent's unlawful actions were directed "almost exclusively towards a single employee;" after the Respondent unlawfully disciplined and discharged the steward, the Respondent unlawfully warned the assembled employees that a similar fate awaited those who encouraged zealous union action. By these actions, the Respondent demonstrated a proclivity to respond unlawfully to the employees' meaningful exercise of their statutory rights. Based on these circumstances, we find that a broad order is warranted in this case.[4]

ORDER

The National Labor Relations Board orders that the Respondent, United States Postal Service, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Threatening employees with unspecified reprisals because they engaged in union or protected activity.

(b) Denying an employee the rights of union representation during an investigatory interview that the employee reasonably believes may result in disciplinary action.

(c) Refusing to permit an employee to speak with the employee's union representative prior to an investigatory interview that the employee reasonably believes may result in disciplinary action.

(d) Failing and refusing to inform an employee and the employee's union representative of the specific charges that are to be discussed during an investigatory interview that the employee reasonably believes may result in disciplinary action.

(e) Threatening employees that they will be discharged for their protected or union activities.

(f) Disciplining employees because of their protected or union activities.

(g) Discharging employees because of their protected or union activities.

(h) Refusing to bargain collectively with the American Postal Workers Union, Local No. 380, AFL-CIO by failing and refusing to provide requested information that is relevant and necessary to the Union as the collective bargaining representative of those Unit employees described in the existing collective bargaining agreement and found appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer John Orlovsky full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. Make John Orlovsky whole for any loss of earnings and any other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and discipline issued to John Orlovsky, and within 3 days thereafter notify John Orlovsky in writing that this has been done and that the discipline and discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic

[4] Member Schaumber dissents from the issuance of a broad cease-and-desist order. As fully set forth in his dissenting opinion in *Postal Service*, 345 NLRB No. 25 (2005), issued this same day, the Supreme Court has made clear that broad orders must be reserved for egregious cases in which the violations are so severe or so numerous and varied as to truly manifest a general disregard for employees' fundamental employee rights. *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941); *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). This is not such a case. The violations here involve conduct directed almost exclusively towards a single employee, a steward well known for his zealous and contentious relationship with management. While Member Schaumber agrees that the conduct was protected, and that Respondent violated the Act in disciplining the steward, a narrow cease and desist order tailored to that conduct and coupled with the other relief ordered suffices to remedy the violations found. The decision of the Tenth Circuit issuing a broad order against the Respondent, relied on by the majority, does not dictate a contrary conclusion. That broad order involved solely information requests, which are not the type of severe unfair labor practices for which broad orders are reserved. See *Postal Service*, supra, slip op. at 5-7. Contrary to the implication of the majority, I recognize that the court's order is as binding as one procured after litigation. However, the Respondent's voluntary agreement to it is, in my view, conduct which is inconsistent with "a general disregard for the employees' fundamental statutory rights." *Hickmott Foods, Inc.*, supra, 242 NLRB at 1357. As stated in my dissenting opinion in *Postal Service*, supra, slip op. at 6, only "conduct that demonstrates a general disregard for fundamental statutory rights and raises the threat of continuing and varying efforts to frustrate those rights in the future" will justify a broad cease-and-desist order like that imposed upon the Respondent by my colleagues. In sum, the circumstances present here do not warrant a broad order restraining the Respondent from committing "any" conceivable violation of the Act at its Albuquerque facility.

form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Furnish the Union with the information requested in the Union's letters dated June 12, 2003, and August 12, 2003, to the extent that such information has not already been provided to the Union.

(e) Within 14 days after service by the Region, post at its Vehicle Maintenance Facility, Auxiliary Service Facility, and main plant facility in Albuquerque, New Mexico, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such closed facilities at any time since September 5, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with unspecified reprisals because they engage in activities in support of the American Postal Workers Union, Local No. 380, AFL-CIO (the Union), or any other union.

WE WILL NOT deny our employees the rights of union representation during an investigatory interview that the employee reasonably believes may result in disciplinary action.

WE WILL NOT deny our employees an opportunity to consult with their union representative before participating in an investigative interview that an employee reasonably believes may result in disciplinary action.

WE WILL NOT refuse to inform our employees and their union representative of the specific charges to be discussed in an investigative interview that an employee reasonably believes may result in disciplinary action.

WE WILL NOT threaten our employees that they will be discharged because of their activities in support of the Union, or any other union.

WE WILL NOT issue a letter or warning, suspend, or otherwise discipline our employees for engaging in activities in support of the Union.

WE WILL NOT discharge our employees for engaging in activities in support of the Union or any other union.

WE WILL NOT refuse or fail to provide and furnish information to the Union that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer John Orlovsky full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent

position, without prejudice to his seniority or any other right or privilege previously enjoyed.

WE WILL make John Orlovsky whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to John Orlovsky's unlawful discipline and discharge, and WE WIL, within 3 days thereafter, notify him in writing that this has been done and that the discharge and discipline will not be used against him in any way.

WE WILL promptly furnish the Union with the information requested in the Union's letters dated June 12, 2003, and August 12, 2003, to the extent that such information has not already been provided to the Union.

UNITED STATES POSTAL SERVICE

Liza Walker-McBride, Esq., for the General Counsel.
Charles Trujillo, for the Charging Party.
Kimberly Blanton, Esq., and *Elizabeth A. Ramirez-Washka, Esq.*, for Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The original charge in Case 28-CA-19148(P) was filed on November 17, 2003[1] and the American Postal Workers Union, Local No. 380, AFL-CIO, herein the Union, filed an amended charge on January 9, 2004. The charges in Cases 28-CA-19149(P) and 28-CA-19327(P) were filed by the Union respectively on November 17, 2003 and February 23, 2004. An amended charge in Case 28-CA-19327(P) was filed by the Union on March 5, 2004. Based upon the allegations contained in Cases 28-CA-19148(P), 28-CA-19149(P), and 28-CA-19327(P), the Regional Director for Region 28 of the National Labor Relations Board (herein the Board) issued an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing on April 30, 2004. The consolidated complaint alleges that the United States Postal Service (Respondent) discharged employee John Orlovsky on January 29, 2004 because of his activities on behalf of the Union and in violation of Section 8(a)(3) of the National Labor Relations Act (the Act). The complaint further alleges that between September 5, 2003 and Orlovsky's discharge on January 29, 2004, Respondent issued the following disciplinary actions to Orlovsky because of his activities on behalf of the Union: (1) an official discussion on September 5, 2003 (2) fact finding meetings on September 9, 2003, October 16, 2003, and December 4, 2003, (3) a letter of warning on September 11, 2003, (4) a seven-day suspension on November 20, 2003, and (5) a 14-day suspension November 26, 2003. The complaint also alleges that during a period between September 5, 2003 and the first two weeks of December 2003, Respondent's agents engaged in nine incidents of conduct that interfered with, restrained, and coerced employees in their exercise of rights guaranteed by Section 7 of the Act and in violation of Section 8(a)(1) of the Act. The consolidated complaint that issued on April 30, 2004 also alleged that Respondent has failed and refused to provide certain information to the Union in response to the Union's requests for information on August 12, 2003, August 15, 2003, September 10, 2003, October 6, 2003, and November 5, 2003. By motion at trial, General Counsel amended the consolidated complaint to allege that Respondent delayed in providing specific information identified in the original consolidated complaint.

This case was tried in Albuquerque, New Mexico, on June 21, 22, 23, and 24, 2004, at which all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. General Counsel and Respondent filed briefs, which I have duly considered. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent provides postal services for the United States and operates various facilities throughout the United States, including the facility located in Albuquerque, New Mexico, which is the subject of this proceeding. The Board has jurisdiction of this matter pursuant to Section 1209 of the Postal Reorganization Act, 39 U.S.C. Section 1209. Respondent admits, and I find and conclude, that the United States Postal Service, hereinafter referred to as the Respondent, is an employer within the jurisdiction of the National Labor Relations Board. Respondent admits, and I further find that the American Postal Workers Union Local No. 380, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties' Bargaining Relationship

In the Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing, it is alleged:

> (a) The employees of the Respondent referred to in the collective bargaining agreement described below in paragraph 5(b) including the Respondent's employees employed at its Albuquerque facilities, herein called the Unit, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act and Chapter 12 of the PRA.
>
> (b) Since in or about 1971, and at all material times, the National Union has been the designated exclusive collective-bargaining representative of the Unit and since then the National Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from November 21, 2000, through November 20, 2003 and extended by mutual agreement of the parties until November 20, 2005, herein called the Agreement.

[1] Unless otherwise indicated, all dates herein are 2003.

(c) At all material times the National Union, based on Section 9(a) of the Act and Chapter 12 of the PRA, has been the exclusive representative of the Unit.

(d) At all material times the National Union has designated the Union as its designee for the purpose of conducting certain of its functions as the exclusive collective-bargaining representative of the Unit, including, but not limited to, the filing and processing of grievances.

Inasmuch as Respondent admits each allegation described above with respect to the bargaining relationship, I find that the Union is the collective bargaining representative for those employees employed at Respondent's Albuquerque facilities as identified in the existing collective bargaining agreement.

B. Overview

This case involves Respondent's conduct toward Union Craft Director John Orlovsky and the discipline issued to Orlovsky between September 5, 2003 and the time of his discharge on January 29, 2004. The case also includes allegations that Respondent either failed to provide or delayed in providing information requested by the Union during the period between August 12, 2003 and November 5, 2003.

C. 8(a)(1) and (3) Allegations Relating to John Orlovsky

1. Background

For over four years, Thomas C. Smith has held the position of Manager for Respondent's Vehicle Maintenance Facility in Albuquerque. The Vehicle Maintenance Facility, herein VMF, is responsible for the maintenance of all of Respondent's motor vehicles in its Albuquerque District. Michael Quintana has worked for the VMF for 32 years and has been the VMF supervisor for the past two and a half years. Michael Quintana, herein Quintana, supervises administrative clerks, stock room employees, and approximately 17 automotive technicians. At all times relevant to this proceeding, Mathew (Matt) Cordova was the Lead Automotive Technician. In Quintana's absence, Cordova served as an acting supervisor.[2] Both the stock room employees and automotive technicians are represented by the American Postal Workers Union. In addition to president, vice-president, secretary, and treasurer, there are also individual directors for the clerk craft, maintenance craft, and the motor vehicle craft. Craft directors not only file and process grievances, but also submit information requests to Respondent and perform other union steward duties associated with the maintenance of a collective bargaining agreement.

John Orlovsky began his employment with Respondent in 1988 as a letter carrier. In approximately 1995 or 1996, Orlovsky transferred to the VMF. Prior to his discharge in January 2004, Orlovsky had been the Motor Vehicle Craft Director for two years. Prior to September 2003, Orlovsky had never submitted a request to take work time for union business and he had filed only one grievance.

[2] The acting supervisory position in the VMF is also referenced as a 204B position.

2. The Events of September 5, 2003

A "Stand-up" is a crew meeting or briefing called by management to address safety issues or other matters designated for discussion by management. On September 4, Quintana held a stand-up with all of the VMF employees for all shifts. Orlovsky testified that prior to this meeting, there was no established policy as to how employees were to dispose of their soiled uniforms. While some employees placed their soiled uniforms into a hamper, other employees hung their uniforms on a rack in the restroom or in their lockers. During the September 4 meeting, Quintana told employees that they were required to either hang their uniforms in their lockers or to roll-up their uniforms before placing them in the designated hamper. After Quintana distributed a copy of the new policy, he asked employees to read over it and to sign it. During the meeting, Orlovsky voiced his concern that rolling up the uniforms would take additional clean-up time at the end of an employee's shift[3] and he also complained that placing his uniform in his locker would occupy space that he used for other personal belongings. Orlovsky also raised a concern about Quintana requiring the employees to sign a statement acknowledging the uniform policy. Orlovsky took issue with Quintana's action because he perceived the policy to alter the collective bargaining agreement by adding duties to the 10 minutes of designated clean-up time already provided in the contract. He also took issue with Respondent's requiring employees to sign a "company-generated" document.

The following day Orlovsky drafted an information request seeking "copies of all signed VMF policies dated September 4, 2003." While making copies of the request in Smith's office, Orlovsky encountered both Quintana and Smith. Quintana testified that he had already learned from Human Resources that the employees' signed documents were not "legal" and he had been instructed by Human Resources to either tear up the documents or return them to the employees. When Quintana received Orlovsky's request, he was not sure whether he could give Orlovsky copies of other employees' forms. When Quintana handed a copy of the information request to Smith, Smith inquired as why Orlovsky had submitted such a request. Orlovsky explained that the requested information would be used by the Union to determine whether there was a grievable issue. Smith responded that such a request was childish and foolish. Smith added that employees would suffer for his actions and that Orlovsky was "already in trouble." Orlovsky told Smith that because he (Smith) had threatened him, he wanted a union representative present. Orlovsky recalled that Smith told him no and directed him to sit down when Orlovsky attempted to leave the office. When Smith added that he had interrupted him and asked for his time, Orlovsky explained that it had been Quintana who had initiated the conversation with Smith and not Orlovsky. After Quintana confirmed the sequence, Orlovsky again asked to leave and was allowed to do so. Quintana described Orlovsky's conduct during the conversation as loud and abusive and acknowledged that he denied Orlovsky's request

[3] Article 39 of the CBA provides that vehicle maintenance employees will be allowed 10 minutes at the end of their shift for changing clothes and "wash-up."

for a union representative because the meeting was not an official discussion nor disciplinary in nature.

After leaving Smith's office, Orlovsky went to the shop phone and called Union officer Jeff Padilla. Orlovsky began explaining to Padilla what had just occurred. Orlovsky testified that while he had previously used the telephone without permission, Quintana yelled over to him and told him to discontinue his call because he did not have permission to use the postal service phone. Section 8 of Article 17 of the collective bargaining agreement provides the following:

The parties recognize that telephones are for official USPS business. However, the Employer at the local level shall establish a policy for the use of telephones by designated Union representatives for legitimate business related to the administration of the National Agreement, subject to sound business judgment and practice.

Quintana testified that because the telephone in the shop is the supervisor's main line where all requests are received concerning vehicle repairs or breakdowns, employees are required to obtain permission to use that telephone. Quintana recalls that when he told Orlovsky that he did not have permission to use the telephone, Orlovsky responded that it was union business and he had the right to use the telephone. Quintana contends that he asked Orlovsky twice to get back to work and when he did not do so, he issued a direct order for him to do so.

Following Orlovsky's lunch break, Quintana called Orlovsky to the office. Quintana explained that the meeting constituted an "official discussion" concerning Orlovsky's conduct in the earlier meeting with Smith. Quintana testified that he gave Orlovsky the official discussion because Orlovsky was "borderline insubordinate" during his earlier meeting with Smith and Quintana.[4] Article 16 of the collective bargaining agreement provides "For minor offenses by an employee, management has a responsibility to discuss such matters with the employee."

The contract section provides that the discussions are to be held in private and are considered neither discipline nor grievable. The section further provides that while the discussions may not be cited as "an element of prior adverse record in any subsequent disciplinary action," they may be, "where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities." Orlovsky questioned how Quintana could conduct an "official discussion" concerning something that occurred on "union time." Orlovsky went on to explain to Quintana that the earlier meeting with Smith occurred because Smith questioned him about his making the union request for information. Quintana responded that Orlovsky had not been on union time because he had not been authorized to be on union time.

[4] Quintana acknowledged, however, that insubordination occurs when an employee is given a direct order or instruction and the employee does not follow the order. When asked on cross-examination to explain the nature of Orlovsky's conduct, Quintana described him as uncooperative and contentious. While Quintana asserted that such conduct occurred on a daily basis, he had never previously disciplined Orlovsky or conducted an official discussion.

3. Orlovsky Continues with Requests for Union Time and Begins to File Grievances

On September 8, Orlovsky submitted a written request to Quintana for four hours to work on union grievances and he was granted one hour at the end of his shift on September 9. On September 9, Orlovsky submitted another request to Quintana for 8 hours for union time to file grievances on contract issues. Quintana denied the request stating: "Time requested seem[s] excessive, will authorize less time based on needs of service." In addition to his request for 8 hours for union time, Orlovsky also filed two grievances on September 9. In grievance number MVS-03-05, Orlovsky referenced the September 4, 2003 meeting, alleging "management forced employees to sign VMF policies." Orlovsky also asserted in the grievance that such action was a clear violation of the collective bargaining agreement, herein CBA, citing a third step decision in a prior grievance in which there was an agreement that signing any type of form for management is optional for employees. In management's written response, Quintana denied the grievance and asserted that no employees were "forced" and added "No one but John denied to sign the paperwork." In grievance number MVS-03-06, Orlovsky alleged that the new uniform procedure affected the CBA concerning clean-up and unilaterally changed conditions of employment.

4. Orlovsky's Letter of Warning

Smith testified that a fact-finding interview with an employee is conducted to determine whether there is any cause or reason to issue discipline. Normally, the supervisor prepares proposed questions in advance of the fact-finding interview. On September 9, Quintana conducted a fact-finding interview with Orlovsky. Prior to the meeting, Quintana arranged for union representative Chris Fulton to be present. When both Fulton and Orlovsky asked Quintana for a copy of the fact-finding questions prior to the meeting, Quintana initially declined. Orlovsky recalled however, that at some point in the meeting, Quintana provided a copy of the questions. The written questions reflect that Orlovsky was questioned about three different areas. The "facts" listed for discussion with Orlovsky included:

Saturday while picking up 4570's[5] from the Vans, The B-van which had been used by you was found to be dirty i.e. Gloves, dirty rags in the Drivers compartment, and trash on floor.

As I was checking for Work Orders on the shop room floor, I found your Top and Bottom Tool box unlocked. (Unsecure Tool Inventory/Company assets.)

While closing out work orders Saturday morning, two of your work orders were missing Account codes, and Monday evening you turned in another S/M without the Account Code.

Quintana testified that Lead Mechanic Matt Cordova normally checks the vans and verifies whether the toolboxes are locked. He explained, however, that on September 6, he decided that he would personally check the vans for the 4570 forms. He testified that checking Orlovsky's toolbox then

[5] Quintana testified that a 4570 form is a vehicle record of utilization form that is maintained in each of the VMF service vans showing the date, time, employee, and mileage for each time the van is utilized.

came to mind because Orlovsky had held out a work order from the previous day.

On September 11, Quintana issued a letter of warning to Orlovsky for failure to follow instructions. Specifically, the letter reprimanded Orlovsky for: (1) failing to fully complete the work orders, (2) failure to clean out the service van, and (3) leaving his toolbox unlocked. Each of these infractions occurred on September 5. The letter of warning also refers to the fact-finding interview with Orlovsky on September 9 and Orlovsky's demeanor is described in the warning letter as uncooperative and contentious.

5. Orlovsky's Additional Grievances and Requests for Union Time

On September 11, Orlovsky submitted a request for 8 hours for union time to file grievances. Quintana denied the request stating: "Too vague, no specific grievance mentioned and 8 hours is too long." The following day Orlovsky submitted a new and more detailed request for 8 hours for union time for September 15. Orlovsky specifically listed five incidents occurring on September 5 as well as incidents occurring on September 10 and 11 that required time for union business. As Quintana was away, Orlovsky gave the request to Smith. Smith responded that the request would be forwarded and handled by Quintana upon his return to work on September 17.

On September 17, Orlovsky filed grievance number MVS03-08. In the grievance, Orlovsky asserted that Respondent had violated an established past practice by removing the TV from the employee break room. The corrective action sought was "Make whole, Repair TV Immediately or replace with equivalent in the VMF break room." Orlovsky testified that the TV was removed from the break room sometime around September 15 to 17. Orlovsky acknowledged that he had no discussion with either Smith or Quintana about the removal of the TV prior to filing the grievance. He contended however, that he had heard from Cordova that Smith had stated that the TV was not going to be repaired or returned to the break room because the employees did not deserve it. The grievance was denied at the first step and management asserted not only that past practice did not play a role but also that the TV was removed for repair.

6. Orlovsky's Accident

On September 18, Orlovsky met with Quintana for a step one grievance meeting for the four grievances that he filed on September 9 and 17. Later that same day, as Orlovsky was moving one of the vans to check the transmission fluid, he struck the lower portion of the door as he backed out of the facility. Orlovsky immediately reported the accident and completed an accident report at Quintana's direction. For approximately the next week to ten days, Orlovsky took sick leave. Orlovsky testified that he was under a doctor's care for work-related stress. When he returned to work, he was informed that his driving privileges for Respondent's vehicles were suspended pending his completion of a refresher-training course.

7. Orlovsky's Additional Grievances and Requests for Time for Union Business

On October 2, Orlovsky filed a request for 8 hours of time for union business to file step two grievances. He lists the grievance issues as "phones, TV, signing, and policies." Quintana denied the request, stating, "Time requested seems very excessive. Will allow 2 hours 10/3/03 per John's agreement. 6:00 – 8:00 a.m."[6] On October 6, Orlovsky submitted a request for 3 hours for union time to draft and to send step two grievances. Two hours of time were approved.

On October 6, Orlovsky also gave Quintana a new grievance (MVS0309), alleging that management was contracting out maintenance work historically performed by the Motor Vehicle Craft. On October 14, Orlovsky followed by requesting 3 hours of time to file the union's step two response on the contracting grievance. Quintana allowed the three hours to be used over two workdays and also confirmed that management would grant an extension of time for the Union's step two response.

8. Orlovsky's Next Discipline

Quintana scheduled a fact-finding with Orlovsky on October 16 and Jeff Padilla was the first union representative called to act as a representative for Orlovsky for the 10:00 a.m. meeting. Quintana testified that he was only able to cover the first ten questions. He recalled that the meeting ended because Padilla became really "abusive and vulgar and threatening." Padilla testified that when he arrived at the fact-finding interview, he asked for the nature of the charges and to speak with Orlovsky in private. Padilla testified that Quintana refused his request and told him to sit down and shut up. Padilla also recalled that when he told Quintana that he needed a copy of the proposed questions and an opportunity to speak with Orlovsky in private, Quintana ordered him to leave the building. Padilla testified that because he was ordered to leave, he was never present for any part of the October 16 fact-finding.[7] Quintana's fact-finding notes reflect that union representative Chris Fulton replaced Jeff Padilla at approximately 11:05 a.m. Both Fulton and Orlovsky asked for a copy of the proposed questions. Fulton testified that despite Quintana's providing a copy of the questions, he did not explain the basis for the fact-finding. Fulton testified that because he and Orlovsky had not known what the fact-finding involved or the consequences involved, he advised Orlovsky to respond with "no comment" to the questions. Quintana's notes reflect that the questions posed to Orlovsky during the first October 16 fact-finding included the following:

You have publicly made multiple comments recently that you were going to begin a "work slow-down" and you were going to make management's lives miserable. Is that correct?

You interrupted my September 4, 2003, stand-up briefing, with such comments in the presence of Tour 2 in the swing-room. Is that correct?

---

[6] Orlovsky testified that he had agreed to the 6:00 a.m. to 8:00 a.m. time frame.

[7] Orlovsky recalled that Quintana ordered Padilla out of one of the fact-finding interviews but he could not recall the exact date.

Shortly thereafter, you stated to Lead Automotive Technician Mathew Cordova, that you were going to enact a work slow-down to which he replied "No, your are not; I will not allow you!" Is that correct?

On Thursday, 9/18/03, did you not file a Step 1 grievance with me which stated "Management stated they are not putting said TV back in the Break-room?

Who specifically of management, made that statement?

Quintana's notes also reflect that he also asked Orlovsky about the following: (1) excessive and loud blaring of the horn when backing a vehicle out of the VMF bay on Thursday, September 11 and (2) Causing anxiety/concern to Mathew Cordova by telling Cordova that fellow employees Oney Montoya was not in the van with him and then calling back a minute later to clarify that Montoya was in the van. There were additional questions on the document that were omitted or not covered during the interview.

When Quintana asked Orlovsky about his filing of a grievance, Fulton stopped the meeting. Fulton told Quintana that he was getting into an improper area by questioning Orlovsky about his union activities. Fulton explained to Quintana that Orlovsky's union activities had nothing to do with a disciplinary or investigative interview and the fact-finding ended. Fulton gave Quintana a written request for every document upon which he was relying in the fact-finding as well as a request for a copy of the question sheet completed by Quintana. Quintana conferred with Smith and then Smith provided Fulton with the same copy of the questions that had been provided at the beginning of the fact-finding.

Fulton testified that when he asked for the opportunity to confer with Orlovsky, Quintana denied the request and stated that Orlovsky was scheduled for another fact-finding interview. While Fulton was given an opportunity to confer with Orlovsky prior to the second fact-finding, Orlovsky was unable to tell him what it might involve. Fulton testified that Quintana seemed to be going over the same ground in the second fact-finding and asked questions that required only a "yes" or "no" answer. Fulton finally ended the fact-finding and explained that Quintana appeared to be asking questions designed to trap Orlovsky into saying something that he should not say. Quintana's notes reflect that at 11:40 a.m., Fulton advised Orlovsky to not participate further in the fact-finding and they left the fact-finding. Quintana's worksheet for the second fact-finding reflects that "Yes" or "No" answers were requested for seven of the 11 proposed questions pertaining to Orlovsky's accident on September 18. When Fulton stopped the interview at 11:45 a.m., Quintana had covered four of the questions asking for a "Yes" or "NO" response.

9. Orlovsky's Seven-Day Suspension

On November 20, Quintana gave Orlovsky a seven-day suspension. The suspension was based upon the charges of failure to follow instructions and unacceptable conduct. Four incidents were outlined as a basis for Orlovsky's failure to follow instructions. They were described as:

On September 11, 2003, you interrupted employees in the performance of their duties by blaring a vehicle horn extensively while backing a vehicle out of a VMF work bay. You have been instructed in the past to honk twice while backing up. You failed to follow this instruction in continuously and excessively honking the horn.

On September 18, 2003, you failed to properly respond on your two-way radio, as instructed in the past, causing your supervisor anxiety-concern by electing to provide false information to him in response to his direct question to you.

From September 17 through September 23, you had clocked excessive repair time on work orders and you failed to consult and receive my prior approval to exceed the estimated repair.

On October 16, 2003, an investigative interview was held with you. You were represented by Jeff Padilla. Prior to me asking you any questions, your representative requested a copy of the questions that I was going to ask you. I told him that I would give him a copy after my interview. I then proceeded to ask you the first question. Even before I could finish the question, Jeff Padilla interrupted and tried asking me a question. I informed him that he was not to interrupt this interview with questions to me, but rather, he was there to advise the employee. He got upset and hollered "bull fucking shit" while slamming his fist on the table. The investigative interview ended at this time. Another investigative interview was held with you on the same date but with Chris Fulton as your representative. After asking a few questions, and upon advice of the union, you declined to answer any additional questions, thereby concluding the interview.

The charge of unacceptable conduct was based upon the following:

On September 4, 2003 you publicly threatened management to make "Your lives miserable" and advised Mathew Cordova, Lead Automotive Technician, on two separate occasion, that you were going to enact a work "slow down." Mr. Cordova responded with "No, you are not" and that he "would not allow you to enact a "work slowdown."

10. Orlovsky's 14-day Suspension

By letter dated November 19, 2003, Respondent mailed to Orlovsky a notice of a 14-day suspension. The letter reflects that the suspension was based upon the charge of "Failure to follow instructions when you backed vehicle #4932272 into the garage door." Specifically, the letter charged Orlovsky with causing damage in excess of $1526.13 when he backed out the vehicle without checking the area and opening the garage door for clearance. Orlovsky was also charged with failing to document the accident damage on the Preventive Maintenance Sheet attached to the required work order.

11. Orlovsky's Final Union Activity and Final Fact-Finding

On November 26, Orlovsky submitted a written request for information to Quintana for various reports and receipts concerning the issue of contracting out work. On December 3, Orlovsky submitted a request for 3 hours for union time for investigation and to file a grievance. Quintana responded that he would grant some time to Orlovsky later in the week. The next day, Orlovsky was called to a fact-finding interview. Padilla testified that he was called as the union representative to attend the interview with Orlovsky, Quintana, and Smith. At the onset of the interview, Padilla asked to know the charges and asked to receive a copy of the proposed questions. Padilla

testified that both Quintana and Smith told him they were not going to give him a copy of the questions and he was not allowed to know the charges. Padilla told Orlovsky that Respondent was already in a due process violation. While he gave Orlovsky the option of leaving, Orlovsky declined and remained to answer Quintana's questions. Respondent's notes reflect that Orlovsky responded to all of the proposed questions. The fifteen listed questions concerned two primary incidents. One of the incidents mentioned involved Lead Mechanic Cordova's inability to reach Orlovsky for six minutes on December 3 because Orlovsky left his radio in the service truck while working on another vehicle. The second incident involved a charge that Orlovsky improperly installed push rods in one of the vehicles. The questions also reflect that Quintana also accused Orlovsky of dropping a bracket into an intake manifold on July 30 and dropping an intake bolt on November 15 that added excessive time for a work order. In question 15 of the fact-finding, Quintana questions whether Orlovsky is "in fact" following through on his public declaration of a work slowdown. Respondent's notes reflect that Orlovsky denied making such a declaration.

12. Orlovsky's Removal

By letter dated December 16, Respondent issued a Notice of Proposed Removal to Orlovsky. Respondent's letter states that the proposed action was based upon two specific incidents of what was described as his failure to follow instructions. Specifically, Respondent cites Cordova's failure to reach Orlovsky by radio for six minutes on December 3 and the improper installation of push rods. Additionally, the letter states that Respondent considered the September 12 letter of warning as well as the 7-day suspension on November 20 and the 14-day suspension on November 26 in arriving at the decision to remove Orlovsky. By letter of January 29, Respondent notified Orlovsky of its final decision of removal.

13. Smith's Meeting with Employees After Orlovsky's Removal

Smith confirmed that approximately a week after Orlovsky was "formally walked off the floor," he conducted a meeting with the VMF employees. As reflected by his written outline, Smith compared employment to participating in a lifeboat. Smith told employees that in a lifeboat situation, participants have "limited alternatives of appropriate behavior available to them." The following excerpts[8] were included as a part of Smith's six-page written outline:

> In ANY specific JOB, the ALTERNATIVES for APPROPRIATE BEHAVIOR for that job are limited.
>
> When individuals come to work for our company, they are in fact:
>
> Offering to *restrict their selection of alternate behaviors* to those which *we are willing to pay for*.
>
> As with a group of any size, we have a miniscule number amongst us who think THEY should determine the direction of the VMF. That number was reduced this past Thursday.
>
> A word to the wise: If you are amongst that minute number, you would do well to:
>
> Reconsider your ways.
>
> If OLD ENOUGH TO PARENT CHILDREN – NEED TO GROW UP and act as AN ADULT.
>
> Now let me make myself very clear about what I am about to say:
>
> I am not "union bashing" or speaking ill of the union.
>
> I have absolutely no problems with unions.
>
> They have a job and purpose, just as management has a job and purpose.
>
> This is not about the union; rather it is about your union representative's behavior,
>
> It could well be about *any one of you*, should you so choose self-destructive behavior.
>
> Your Craft Director, appears to be under the *erroneous impression:*
>
> *He is appointed to run the VMF*, rather than perform the work he was hired to do.
>
> I haven't the foggiest Notion, what role he thinks *management* is hired for.
>
> In his failed attempts to deride and ridicule, whine and complain about virtually everything, he appears to have forgotten that we rented his behavior for technical repairs:
>
> He climbed in our lifeboat
>
> All he wanted to do was "dance"
>
> It was EXPLAINED to him NUMEROUS TIMES by MYSELF, MIKE & MATT
>
> He could row, steer, fish, hit seagulls on the head or catch rainwater – NOT DANCE.
>
> He REFUSED and INSISTED ON "DANCING"
>
> This is self-destructive behavior
>
> It endangers everyone in the boat
>
> Thus, it is unacceptable behavior and management rightfully dealt with it.

Smith also told the employees that if they were "card carrying" union members and did nothing to address the "selfish way" that Orlovsky was squandering union dues and wasting postal funds, they bore a portion of the responsibility for his conduct. Smith talked about the grievances filed by Orlovsky and asked: "How many would willingly take, say $60.00 out of their pocket – use to file such triviality. *Collectively-you did*! And for what?" Smith continued the meeting by describing the ways in which he had improved their working conditions since his arrival at the VMF in 1999. At the conclusion of the meeting, Smith told employees:

> When MIKE, MATT, OR JAMES directs you to:
>
> STEER, ROW, FISH, HIT SEAGULLS on the HEAD or CATCH RAINWATER
>
> Do NOT, VERBALLY or by your ACTIONS say JUST WANT TO DANCE"
>
> It is SELF-DESTRUCTIVE BEHAVIOR.

[8] The capitalization, underlining, and bold print are shown as appearing in Smith's notes.

D. Analysis and Conclusions for 8(a)(1) and (3) Allegations

1. Alleged 8 (a)(1)

(a) Smith's Actions Toward Orlovsky on September 5

Orlovsky testified without contradiction that Smith described his request for information as childish and foolish and threatened that employees would suffer for his actions and that Orlovsky was "already in trouble." There is no dispute that Smith denied Orlovsky's request for a union representative during this same conversation. As a basis for denying the request, Quintana recalled that he told Orlovsky that they were just talking and there was nothing official occurring. Quintana also recalled:

> And he said, well, I don't want to be here. Then I said, well, you know, we're not done with you, we're having a meeting here.

Quintana asserted that while he told Orlovsky that the meeting was not official or disciplinary, Orlovsky became loud and abusive. Quintana acknowledged that at one point Orlovsky opened the door to the office and Smith and Quintana told him to sit down. While I found Orlovsky's demeanor as somewhat arrogant and his testimony to be self-serving, his testimony was unrebutted[9] and overall credible. Accordingly, I find that Respondent threatened Orlovsky with unspecified reprisals because of his activities on behalf of the Union as alleged in paragraph 5(a)(1) of the complaint.

In *NLRB v. Weingarten, Inc*., 420 U.S. 251 (1975), the Supreme Court upheld the Board's holding that Section 7 of the Act protects an employee's right to have union representation at an investigatory interview which the employee reasonably believes might eventually result in disciplinary action. "*Weingarten*" rights inhere in both "investigatory" and "disciplinary" interviews. The Court also clarified that the test for determining whether an employee reasonably believes that the interview might result in disciplinary action is measured by objective standards under all the circumstances of the case rather than by the employee's subjective motivation. *NLRB v. Weingarten, Inc*., at 257, fn. 5. While the conversation with Smith does not fit within the framework of the traditional investigatory or disciplinary interview envisioned by the Board and the Court, there is credible evidence that Smith not only questioned Orlovsky about his actions but also threatened Orlovsky with reprisals because of his actions. Thus, in these circumstances, Orlovsky could reasonably have believed that the continuation of the conversation might result in disciplinary action. Accordingly, Respondent's failure to allow Orlovsky union representation is also violative of the Act as alleged in complaint paragraph 5(a)(2).

(b) Quintana's Actions Toward Orlovsky

Orlovsky testified that Quintana not only interrupted his telephone call to the union, he also later called him into an official discussion concerning his conduct in the earlier meeting with Quintana and Smith. Orlovsky testified that he had previously used the telephone without needing permission and he also referenced a section of the contract that allows use of the telephones by union representatives for union business subject to sound business judgment and practice. While Quintana did not rebut Orlovsky's allegations with respect to the September 5 phone incident, there is not sufficient evidence to show that Orlovsky or any other employee or union representative was given unrestricted use of the shop telephone. Orlovsky's assertion to Quintana that he had a right to use the telephone for union business did not give him carte blanche to ignore his supervisor's directive to return to work or grant him authority to override a work directive. Accordingly, I find insufficient evidence to support complaint allegation 5(b)(1).

Orlovsky testified that when he met with Quintana for an "official discussion," Quintana told him that he had been borderline insubordinate in the meeting with Smith and Quintana. Orlovsky questioned how he could receive an official discussion for what occurred on union time. Quintana denied that the meeting was union time because Orlovsky had not been authorized for union time. Quintana acknowledges that he and Smith discussed grievances and some of Orlovsky's other concerns such as the TV issue during this meeting. Quintana described Orlovsky as getting really "hot" and "loud" and described his conduct as "abusive." The record reflects that Respondent uses an official discussion as a means of putting an employee on notice that his or her conduct is not acceptable and it also lays a foundation for discipline to be given when the employee continues the same conduct. Based upon the overall record evidence, I find that Quintana's official discussion with Orlovsky was based upon Orlovsky's response to Smith and Quintana during a meeting that was in itself violative of the Act. By conducting the official discussion and through his statements made therein, Quintana threatened Orlovsky with unspecified reprisals because of his actions on behalf of the Union. Accordingly, I find merit to complaint paragraph 5(b)(2).

(c) Allegations involving the September 9, October 16, and December 4 Fact-finding Interviews

The Board has long recognized the Supreme Court's intention in the *Weingarten* decision to strike a careful balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role to be played by the union representative present at such an interview. *Southwestern Bell Telephone Co*., 251 NLRB 612, 613 (1980), enf. denied 667 F.2d 470 (5th Cir. 1980); *Texaco, Inc*., 251 NLRB 633, 636 (1980), enfd., 659 F.2d 124 (9th Cir. 1981). In its decision in *New Jersey Bell Telephone Company*, 308 NLRB 277, 279 (1992), the Board noted: "It is clear from the Court's decision in *Weingarten*, that the role of the union representative

[9] Counsel for Respondent argues in her brief that Counsel for the General Counsel failed to corroborate Smith's alleged threat to Orlovsky on September 5. While Respondent argues that Counsel for the General Counsel did not corroborate this threat by failing to question either Smith or Quintana about this statement on 611(c) examination, it is Respondent's burden to address or rebut the outstanding allegations. Respondent failed to call Smith at any time during its case in chief and although it called Quintana as a witness, Quintana was never questioned about this alleged threat. Accordingly, Orlovsky's testimony remains unrebutted with respect to Smith's alleged threat on September 5.

is to provide assistance and counsel to the employee being interrogated." The Board went on to observe: "The Court specifically declared, however, that the presence of the representative should not transform the interview into an adversary contest or a collective-bargaining confrontation, and the exercise of the *Weingarten* right must not interfere with legitimate employer prerogatives."

Paragraph sections 5 (c)(d) and (e) allege that during the investigatory interview on September 9, Respondent denied the request of Orlovsky and his Union representative, Chris Fulton to know the subject of the interview and to confer before the interview. Quintana asserted that while there is a provision in the supervisor's handbook as well as in the collective bargaining agreement that gives an employee the right to know the subject of the fact-finding, there is no requirement to provide a copy of the proposed questions to the Union prior to the meeting. Chris Fulton testified that when he asked Quintana what the September 9 fact-finding involved, Quintana told him that he didn't have to tell Fulton. Fulton acknowledged however, that Quintana gave him a copy of the proposed questions prior to beginning the fact-finding. Fulton also asserted that Quintana denied his request to confer with Orlovsky before the fact-finding. While Quintana did not assert that he allowed Orlovsky the opportunity to consult with Fulton prior to the fact-finding, he maintained that he allowed Orlovsky an opportunity to speak with Fulton two or three times during the fact-finding.

Paragraph sections 5(f), (g), and (h) allege that during the investigatory interview on October 16, Respondent denied the request of Orlovsky and Union representative Chris Fulton to know the subject of the interviews. Fulton testified that Quintana again told him that he did not have to tell him the subject of the inquiry. Fulton acknowledged, however, that prior to the fact-finding, Quintana gave him a copy of the questions and also gave him an opportunity to speak with Orlovsky.

Complaint paragraph section 5(i), (j) and (k) allege that during the investigatory interview on December 4, Respondent denied the request of Orlovsky to know the subject of the interview and denied Orlovsky an opportunity to confer with his Union representative, Jeff Padilla, before the interview. Padilla testified that prior to the beginning of the fact-finding, he requested not only a copy of the proposed questions but also the opportunity to speak with Orlovsky. Padilla testified that both Quintana and Smith denied his requests. While Quintana testified that it is his practice to tell the employee the subject matter of the fact-finding and to give the employee an opportunity to confer with his or her union representative, Quintana did not address his procedure for this particular fact-finding.

While Quintana asserted that it is his practice to tell the union the nature of the charges prior to the investigatory interview, the record does not support this assertion. Quintana's notes from the initial October 16 fact-finding indicate that the meeting was scheduled for 10:00 a.m. Quintana includes in his notes:

> I started by reading the first comment on my fact-finding, Jeff interrupted to ask for a copy of my questions prior to starting.
>
> I responded that I would be happy to give him a copy after the ff, Jeff insisted by saying that they have to know before hand what the charges are. I again responded that after the meeting a copy would be provided. He requested that I make a note that I refused him a copy. I said okay.

Quintana's notes reflect that the first line of his inquiry included only: "This is a Fact-Finding Investigative Interview into what I perceive may be considered insubordination and/or sabotaging of the VMF mission; do you desire union representation?" Quintana's notes from the September 9 meeting reflect no introductory summary. The fact-finding notes from the second October 16 fact-finding include the introductory summary as: "This is a Fact-Finding Investigative Interview as to the surrounding facts of a vehicle accident you were involved in on Thursday, September 18, 2003; do you desire union representation?" The introductory remarks for the December 4 meeting include: "This is a Fact-Finding investigative interview into what I perceive may be considered insubordination and/or sabotaging of the VMF mission; do you desire union representation?"

Quintana testified that it is his practice during an investigatory interview to tell the union representative that he will give the representative a copy of his questions and notes after the interview. Quintana also asserted that he tells the representative that he is allowed to ask for time to speak to his client at any time "just by requesting." Quintana added that he also explains to the representative that it is "his" investigative interview and they need to let him ask his questions without interruption. While he maintains that he gave the opportunity to consult during the course of the interviews in question, he does not assert that he allowed an opportunity for the representative to consult with Orlovsky prior to the interviews.

While Quintana contends that he initially told Orlovsky and the respective union representatives of the nature of the charges, the statements he gave imparted little information and were vague and cryptic. With there being no real information communicated about the nature of the charges, the prepared questions were the only alternative source of information for Padilla and Fulton as they tried to represent Orlovsky during the fact-finding interview. In the September 9th fact-finding meeting, Quintana provided a copy of the proposed questions to Fulton prior to beginning the fact-finding. He did not however, allow Fulton an opportunity to confer with Orlovsky. During the October 16th fact-finding meeting, Quintana not only provided a copy of the proposed questions to Fulton, but he also allowed Fulton the opportunity to confer with Orlovsky prior to the beginning of Fulton's representation in the fact-finding. The record demonstrates that during the remaining fact-finding interviews in issue, Quintana failed to adequately inform the Union of the charges against Orlovsky and failed to allow Orlovsky an opportunity to confer with the representative prior to the beginning of the fact-finding.

The Board has long held that *Weingarten* rights encompass the right to prior consultation with the union representative prior to an investigatory interview. *United States Postal Service*, 303 NLRB 463, fn. 4(1991); *Climax Molybdenum Company*, 227 NLRB 1189, 1190 (1977). As the Board noted in

Colgate-Palmolive Company, 257 NLRB 130,133 (1981), "Nothing in the rationale of *Weingarten* suggests that, in its endorsement of the role of 'knowledgeable union representative' the Supreme Court meant to put blinders on the union representative by denying him the opportunity of learning the facts by consultation with the employee prior to the investigatory-disciplinary interview. Knowledgeably implies the very opposite. The right to representation clearly embraces the right to prior consultation." In a recent case, the Board reviewed a case in which the employer was alleged to have limited the *Weingarten* representative's role to that of a silent observer. See *Barnard College*, 340 NLRB No. 106, slip op. at 3 (2003), in which the Board, citing *Talstol Corp*., 317 NLRB 290, 331-332 (1995), enfd. 155 F.3d 785 (6th Cir. 1998), pointed out that the union representative cannot be made to sit silently like a mere observer. By refusing to give Orlovsky the opportunity to confer with his union representative prior to the beginning of the fact-finding sessions on September 9 and December 4 and by failing to inform the Orlovsky and the union representative of the specific charges that were to be discussed during the fact-finding on December 4, Respondent interfered with employees in the exercise of the rights guaranteed in Section 7 of the Act and in violation of Section 8(a)(1) of the Act.

(d) Smith's December Meeting with Employees

Within a week after Respondent removed Orlovsky from the job, Smith held a meeting with all employees in the VMF. Inasmuch as his notes from the meeting were admitted into evidence, there is no dispute as to what he told employees. During the speech, Smith talked about Orlovsky's actions as a craft director. He described Orlovsky as one of a miniscule number of individuals who thought they "should determine the direction of the VMF." He announced: "that number was reduced this past Thursday." He went on to tell the employees that if they were among that miniscule number, they would do well to reconsider their ways. In describing Orlovsky's behavior, he cautioned that he could also be talking about any one of them should they choose to engage in the same behavior. Smith's remarks leaves no reasonable doubt that he would take the same action with any one of them who engages in similar conduct. Accordingly, I find that Smith threatened employees by informing them that Respondent had discharged Orlovsky because of his protected activities and in violation of Section 8(a)(1) of the Act.

2. Alleged 8(a)(3)

General Counsel alleges that Respondent issued a series of disciplinary actions to Orlovsky between September 5, 2003 and January 29, 2004 because of his activities in support of the Union. Specifically, General Counsel alleges that the following actions were violative of the Act: (1) the September 5 official discussion; (2) the September 9 fact-finding meeting; (3) the September 11 letter of warning; (4) the October 16 fact-finding meeting; (5) the November 20 seven-day suspension; (6) the November 26 fourteen-day suspension; (7) the December 4 fact- finding meeting; (8) the December 4 placement on paid administrative leave; and (9) Orlovsky's discharge on January 29, 2004. There is thus no dispute that over a span of three months, Respondent took 8 disciplinary actions toward Orlovsky; establishing the framework for Orlovsky's ultimate discharge on January 29, 2004. Prior to the first disciplinary action on September 5, Orlovsky had never filed a request to take time for union business nor had he submitted a request for information. He had, in fact, filed only one grievance during his two-year tenure as craft director. Within hours of his first request for information as a union steward, he was subjected to an official discussion. As Orlovsky continued to file grievances as well as to submit requests for information and requests for authorization to take time for union business, he continued to receive discipline.

(a) September 9 Letter of Warning

Respondent bases the September 11 letter of warning on three infractions alleged to have occurred on September 5.

(1) Failure to properly complete work orders

When a mechanic begins a scheduled maintenance for a vehicle, the mechanic receives a work order with an accompanying PMI inspection work sheet. The mechanic not only initials the sheet to confirm completion of the work, but he also includes the ERT or estimated repair time and the actual repair time for each task for the scheduled maintenance. Quintana testified that Orlovsky failed to include some of the code numbers for the work sheet that he submitted for September 5. Employee Onecimo (Oney) Montoya testified that while there have been occasions when he failed to include account codes on his submitted work orders, he has never been told that he would be subject to discipline for further omissions. Employee Joe Villegas testified that there have been instances when he forgot to add information to the scheduled maintenance worksheet. Villegas recalled that when he has done so, Quintana has paged him to come to the office to complete the forms. Villegas recalled that while Quintana may have "chewed him out" for not doing it, he never disciplined Villegas or told Villegas that he would be subject to discipline for future omissions. Respondent offered no evidence of any other employees who have been disciplined for failure to fully complete the work orders.

(2) Failure to clean the service van

In September 2003, the VMF mechanics shared four vans that were designated as A, B, C, and D. Typically, Cordova used the A van. Montoya and Orlovsky normally used the B van. Employee Tommy Burch, Villegas, and Orlovsky testified that while it was the practice for the mechanics to clean up the vans when they returned to the facility, they had never been told that their failure to do so could result in discipline. Burch testified that the van normally driven by Cordova was normally the dirtiest van as it usually contained old rags, old anti-freeze, transmission fluid, and even broken light bulbs left in the cargo for as much as a month. Quintana acknowledged that while Cordova is the individual who normally checks the vans and collects the vehicle record of utilization forms from the vans, he decided to do so on Saturday, September 6. He testified that in doing so, he found Orlovsky's van to be dirty. Although Montoya shared the B van with Orlovsky, he was not given a fact-finding or disciplined regarding the van. Rather, Montoya testified that Quintana gave him an "official unofficial" discus-

sion about keeping the van clean. Respondent offered no evidence of any other employees who have been disciplined for failing to clean the vans.

(3) Failure to Lock his Toolbox

Quintana testified that on the same day that he inspected the vans for cleanliness, he thought about checking the toolboxes. He explained that the toolboxes came to mind because Orlovsky kept out a work order the previous day and Quintana found the work order in Orlovsky's toolbox. Quintana acknowledged that prior to September 6, he had only randomly checked to determine if mechanics were locking their toolboxes. Quintana asserted that he first checked Orlovsky's toolbox and then he checked everyone else's to show that he was not discriminating. Villegas testified that not only did he fail to lock his toolbox that weekend; he had never locked it before Orlovsky was disciplined. Villegas also testified that while he and Cordova often left their toolboxes open, he was never disciplined for failing to lock his toolbox.

b. Seven-Day Suspension

Orlovsky's November 20th seven-day suspension notice informed him that he was suspended for three incidents involving "Failure to Follow Instructions" and one incident termed "Unacceptable Conduct."

(1) Unacceptable Conduct

The notice of suspension charges Orlovsky with publicly threatening management to make "your lives miserable" on September 4 and with twice telling Cordova that he was going to enact a work "slow down." Orlovsky denied making either statement attributed to him. Quintana acknowledged however, that Orlovsky's alleged threat to make management's lives miserable was made in conjunction with his statement that he intended to file grievances "right and left." Although Quintana alleges that Orlovsky made this threat at the September 4 standup, Respondent presented no witnesses to corroborate this statement. Orlovsky expressly denied making any threat to engage in a work slow down. Respondent offered no direct evidence to the contrary. While Cordova is the only person who allegedly heard the supposed threat to engage in a work slow down, Respondent did not call Cordova as a witness.

(2) Repeated Honking of Horn

Respondent alleges that Orlovsky's repeated honking of the horn when backing a vehicle out of one of the work bays on September 11 interfered with a discussion that Smith and Cordova were having outside the shop. There is no dispute that Respondent's regulations include the provision "Only back vehicle when no alternative is available. Sound horns and use flashers in all backing maneuvers." Smith testified that both employees and contractors have been told that they are to tap their horn only twice while backing up. He admitted however, that he does not know if such a policy is written. Orlovsky testified that he has never received such an instruction. Respondent did not call Cordova as a witness to corroborate either the policy or the incident as alleged.

(3) Failing to Respond by Radio

Respondent alleges that on September 18, Orlovsky failed to properly respond on his two-way radio by giving his supervisor false information and causing his supervisor anxiety/concern. As an acting supervisor, Cordova radioed Orlovsky while Orlovsky was working away from the facility in the service van. Orlovsky testified without contradiction that Cordova radioed him and asked if he had picked up employee Montoya from another location. Orlovsky jokingly told Cordova that he had forgotten Montoya and would have to go back to get him. Orlovsky recalled that in less than a minute, he radioed Cordova and told him that he was joking and that Montoya was actually with him. Orlovsky's estimate of one minute is corroborated by Quintana's prepared questions for the October 16 fact-finding. While Orlovsky did not deny his joking, Villegas and Montoya testified that such joking on the radio is not uncommon by either employees or management. Additionally, I note that Cordova was never presented as a witness to provide any additional information concerning the alleged "anxiety/concern" caused by the one-minute joke.

(4) Failure to Consult and Receive Authority to Exceed Estimated Repair Time

Quintana testified that he reviewed Orlovsky's work order for the week of September 17 and found that Orlovsky had not received authorization prior to exceeding repair time on certain line items. On cross-examination, however, Quintana admitted that on at least one of the work orders, some of the work shown to require excessive time was, in fact, performed by employee James Jeffries and not Orlovsky. No disciplinary action was taken against Jeffries. Orlovsky testified that he had never previously been required to consult his supervisor prior to exceeding the estimated repair time on a work order. He explained that the mechanics had only been told that if they exceeded the estimated repair time, they were to simply include that information in the remarks section of the form and bring it to management's attention. Montoya testified that if he exceeds the estimated time for a particular function, he documents the additional time in the comments section of the form. He denied that management has ever instructed him to get supervisory approval before exceeding the estimated repair time. There is no record evidence that any other employee has been disciplined for failing to obtain pre-approval for exceeding the estimated repair time. Additionally, Respondent submitted no work orders reflecting such prior supervisory authority.

(c) 14-Day Suspension

On November 19, Respondent gave Orlovsky a 14-day suspension for his accident on September 18. In the suspension notice, Respondent charges Orlovsky with backing the vehicle out of the VMF work bay without checking the area and opening the garage door for clearance and causing $1526.13 in damages. Respondent also charges Orlovsky with failing to fully complete the PMI sheet attached to the Work Order for the vehicle in question. As Counsel for the General Counsel points out in her brief, there is no dispute that Orlovsky is responsible for the accident in question. Orlovsky testified without contradiction however, that employee Greg Jefferson had a similar

accident within two months of his accident. Orlovsky testified that while his driving privileges were suspended for a period of time, Jefferson continued to drive a service van performing repairs both at the facility and away. There is no record evidence that Respondent disciplined Jefferson or any other employee for the conduct for which Orlovsky received his 14-day suspension. Quintana testified that while he considered that Orlovsky had been involved in prior automobile accidents, his previous driving record was only a minor part of why he was disciplined. Quintana explained that Orlovsky's work performance and his attitude contributed a large part to why he was disciplined.

(d) Discharge

By letter dated December 16, Respondent notified Orlovsky of its intent to discharge Orlovsky. The proposed discharge was based upon two incidents.

Respondent alleges that on December 3, Orlovsky failed to respond on his two-way radio within six minutes after acting supervisor Cordova attempted to contact him. Orlovsky testified that he left the two-way radio in the service van while he was underneath the vehicle making repairs. When a supervisor at the facility where he was working informed him that Cordova was trying to reach him, Orlovsky immediately returned the call. Respondent contends that because Orlovsky initially failed to respond to the call, Cordova had to call three stations before locating him. Counsel for Respondent points out in her brief that Orlovsky admitted that standard operating policy dictates that he was to have the radio within reach at all times. Villegas testified however, that there have been occasions when he has not responded immediately to a two-way radio communication from his supervisor. He recalled that there have been times when he has left his radio in the van rather than taking it underneath a vehicle and there have been other times when poor reception prevented his receiving a call. Villegas recalled that as much as six or seven years ago, he informed management during a standup that he was not going to take the radio with him when working underneath a vehicle. Villegas testified without contradiction that he has never been reprimanded for his failure to immediately respond to a two-way radio communication.

Respondent also based Orlovsky's discharge on an error in the re-insertion of push rods for a Chevy Lumina undergoing maintenance. Quintana testified that Orlovsky was responsible for this error that resulted in damage of approximately $1400. The work order for this particular vehicle reflects that Orlovsky worked on the vehicle on November 18 and that Edwin Uroc; a mechanic with much less experience, worked on the vehicle on November 19. In reviewing the work order for this vehicle, Villegas testified that the work description reflects that both Orlovsky and Uroc performed the reassembly work. By looking at the work order, he could not determine at what point the push rods were re-inserted. Villegas explained that he had been surprised to learn that Uroc was assigned to work on this engine because Uroc was not familiar with that kind of V-6 engine and he recalled that Uroc's asking for help while working on this engine. Villegas also recalled that heard the engine malfunctioning when Uroc cranked the engine.

Orlovsky denied that he erroneously inserted the push rods. Quintana acknowledged that while Uroc performed over six hours on the reassembly, he had seen no need to conduct a fact-finding with Uroc. Villegas also recalled that approximately six months prior to the hearing, Cordova had a similar problem with the push rods of a vehicle on which he was working and there was damage to the vehicle. Respondent presented no evidence to show that either Cordova or any other employee was disciplined for any similar incident.

By conducting the investigatory interview on September 9, Respondent began a series of disciplinary actions that ultimately led to Orlovsky's discharge on January 29, 2004. After September 9, Respondent conducted two additional investigatory interviews and issued a letter of warning followed by a 7-day suspension and 14-day suspension. Later Orlovsky was placed on administrative leave on December 4 and then terminated on January 29. In assessing the legality of Respondent's discipline of Orlovsky, it must first be determined whether General Counsel has established that a motivating factor in Respondent's discipline was Orlovsky's Union or protected activity. *Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). I find that for each disciplinary action[10] beginning with the September 9 investigatory interview and concluding with the January 29, 2004 discharge, General Counsel has established a *prima facie* showing of discrimination against Orlovsky because of his union and protected activity.

Under the *Wright Line* analysis, the General Counsel must prove not only that Respondent was aware of Orlovsky's union or protected activity, but also that animus was a "substantial and motivating factor" in Respondent's decision to take adverse action against Orlovsky. See *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996). Inferences of animus and discriminatory motivation may be justified under all of the circumstances of the case, even without direct evidence. *Washington Nursing Home Inc*., 321 NLRB 366, 375 (1966). Discriminatory motivation may reasonably be inferred from such factors as inconsistencies between the proffered reason for the discipline; disparate treatment of certain employees with similar work records or offenses; an employer's deviation from past practices, and proximity in time between the employees' union activities and their discharge. *W. F. Bolin v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995).

The Board has long held that where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised. *McLendon Electrical Services*, 340 NLRB No. 73, slip op. at fn. 6 (2003); *LaGloria Oil*, 337 NLRB No. 177 (2002), enfd. 71 Fed Appx. 441 (5th Cir. 2003). I find it significant that Orlovsky received an official discussion on the very same day that he made his first request for information as a union craft director. As he continued to file grievances and to submit requests for time to perform union duties, he continued to be the target of investigative in-

[10] While Respondent asserts that an official discussion is not a part of the disciplinary process, its occurrence lays the groundwork for later discipline to occur. Accordingly, Orlovsky's official discussion on September 5 was also discriminatorily motivated.

terviews and was ultimately taken through each step of the disciplinary process leading to, and including discharge. While Orlovsky had been employed with Respondent for 14 years, there was no evidence of prior discipline. He had filed no requests for information or requests for time to perform union duties prior to September 5 and he had filed only one grievance. All of the three incidents upon which Respondent based Orlovsky's September 9th letter of warning occurred on September 5; the day the he submitted his first request for information. Employees Montoya and Villegas testified that they had engaged in similar conduct without discipline. While there is no dispute that Montoya shared the same van with Orlovsky, he received only an "official unofficial" discussion about the cleanliness of the van rather than the discipline imposed upon Orlovsky.

Although the indirect evidence of animus toward Orlovsky is substantial, the record is also replete with considerable direct evidence of animus. When Smith initially learned that Orlovsky had submitted a request for information, Smith told him that such a request was childish and foolish. Crediting the undisputed testimony of Orlovsky, I also find that Smith unlawfully threatened Orlovsky that his actions would result in adverse consequences. The record reflects that from that day forward, Respondent took every opportunity to ensure the success of Smith's prediction. The most revealing direct evidence of animus is also undisputed. Approximately a week after Respondent placed Orlovsky on administrative leave, Smith held a meeting with all of the VMF employees. Using an analogy of a lifeboat, Smith described Orlovsky's actions in his capacity as a union representative as disruptive. Smith stated that a miniscule number of employees think they should determine the direction of the VMF and then he proudly stated, "that number was reduced this past Thursday." Smith not only described Orlovsky's behavior as craft director as "self-destructive behavior," but he also added: "It could well be about any one of you, should you choose self-destructive behavior." Smith referenced back to his stand-up on September 4 that led to Orlovsky's first request for information and argued why he had required employees to sign the notice concerning disposition of soiled uniforms. Smith also talked with employees about some of the issues that Orlovsky raised as a union representative. He described Orlovsky's grievances as "triviality." It is abundantly clear from Smith's remarks in that meeting that he harbored significant animus toward Orlovsky for his actions as a union representative. His veiled threat that he would treat other employees accordingly if any of them also chose to "rock the boat" could reasonably have had a chilling effect on their own union activity.

While the timing alone of Orlovsky's discipline is substantial in supporting a showing of animus, Smith's comments on September 5, as well as his statements to employees following Orlovsky's termination more than amply demonstrate that all of the discipline administered to Orlovsky was motivated by animus. It is clear from the entire record, including the testimony of both Smith and Quintana, that the motivating factor for Orlovsky's discipline and discharge was his activity as a craft director. Inasmuch as such activity is clearly concerted activity and protected by the Act, it has long been established that discipline for such conduct is violative of the Act. *Public Service Company of Oklahoma*, 314 NLRB 1197, 1199 (1994).

Once the General Counsel makes an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a "motivating factor" in the employer's decision, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected activity. *American Gardens Management Co.*, 338 NLRB No. 76, slip op. at 2 (2002). Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that the action would have taken place even without the protected activity. *Hicks Oils & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991).

In the instant case, there is no record evidence to show that Respondent has ever treated another employee in the same manner. Orlovsky was allegedly given the September 9 letter of warning because he failed to complete a form, lock his toolbox, and leave a shared van clean. He allegedly received the 7-day suspension for: (1) repeatedly honking a horn when backing a vehicle, (2) engaging in a one-minute joke with acting supervisor Cordova, (3) failing to obtain pre-authorization to exceed estimated repair time, and (4) allegedly threatening that he would make management's lives miserable and enact a work "slowdown." Orlovsky's 14-day suspension was allegedly given because of his damage to a vehicle on September 18. Respondent based Orlovsky's discharge upon his failure to return his supervisor's call within six minutes and his alleged incorrect installation of push rods on a vehicle. There is no dispute that Orlovsky damaged the vehicle on September 18, failed to return Cordova's call within six minutes, or engaged in a one-minute joke with Cordova. Additionally, Orlovsky does not deny that he failed to complete a form or that he failed to lock his toolbox. He credibly denies that he incorrectly installed the push rods or that he made any threat to enact a slowdown or to make management's lives miserable.

The fact that Orlovsky does not dispute some of the actions for which he was disciplined does not lend any credibility to Respondent's alleged reasons for discipline. Respondent has not demonstrated that it would have disciplined Orlovsky for these same actions even in the absence of his protected activity. There is no record evidence that Respondent has disciplined any other employees for these same alleged infractions. Employees testified that either they or other employees have engaged in the same or similar conduct without incident.

I find the reasons given for all of the discipline issued to Orlovsky, were not in fact relied upon, but were pretexts for Respondent's taking action against Orlovsky as an outspoken union representative. In her brief, counsel for Respondent asserts that Respondent has demonstrated that Quintana would have disciplined Orlovsky regardless of his union activity. The record does not support such a finding. There is clearly no obligation on the Board to accept at face value the reason advanced by an employer for its adverse action against an employee. *Toll Manufacturing Company*, 341 NLRB No. 115, slip op. at 5 (2004). Additionally, it has been found that "the concurrent existence of an otherwise valid reason for the discharge of an employee does not preclude a factual determination that his discharge was discriminatory if it appears from a

preponderance of the evidence, and the reasonable inferences drawn there from, that the discharge was in fact motivated by the employer's opposition to the employee's union activities." *NLRB v. Buitoni Foods Corp*., 298 F.2d 169, 174 (3rd Cir. 1962).

The record reflects that prior to September 4, 2003, Orlovsky had been an otherwise acceptable employee. While Quintana testified that Orlovsky had a history of being disagreeable and disruptive in the workplace, there is no evidence that such conducted resulted in official discussions, investigatory interviews, or discipline. It was only when Orlovsky began to submit requests for information and requests for time for union business, as well as to file grievances as a craft director that Respondent initiated disciplinary action. Orlovsky's demeanor as well as the undisputed record evidence reflects that Orlovsky probably did not attempt to endear himself to management. As Quintana described Orlovsky's behavior in testimony, his frustration and exasperation with Orlovsky was apparent. Smith's speech to employees in December reflected that he perceived Orlovsky as obstreperous and selfish. While Orlovsky may not have been an ideal or even pleasing employee, the protection of the Act does not allow Respondent to substitute "good" reasons for "real" reasons when the purpose of the discharge is to retaliate for his protected activities. See *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345 (3rd Cir. 1969). I find that all of the alleged mistakes and infractions that were attributed to Orlovsky, even if true, were pretextual reasons for all of the discipline issued to him. In summary, I find and conclude that the real motivation for his discipline was Respondent's retaliation for Orlovsky's rigorous union activity that began on September 4. Accordingly, I find that Respondent discriminatorily disciplined and discharged Orlovsky in violation of Section 8(a)(3) and (1) of the Act.

D. The Union's Requests for Information

Charles Trujillo is employed at Respondent's main post office facility in Albuquerque and has been clerk craft director for 12 years. As clerk craft director, Trujillo oversees the grievance procedure in operations involving those clerk craft employees in every Albuquerque station as well as the plant and VMF facilities. As a part of filing and processing grievances, Trujillo also files requests for information with Respondent. Through the complaint and the complaint amendments, General Counsel alleges that Respondent either failed to provide or delayed in providing for information in response to certain requests filed by the Union through Trujillo in August, September, October, and November 2003.

On November 20, 2001 Plant Manager Eric Martinez[11] distributed a letter of instruction to all EAS employees concerning the procedures that he wanted them to follow when they received an information request. The first line of the letter provides: "Both the Clerk and Mail Handlers General Presidents have agreed that union stewards at the Plant, ASF, and AMF will submit all requests for information directly to a supervisor. This agreement by both parties is intended to eliminate the ongoing problems that both sides have experienced with requests for information. Both parties agree that stewards will no longer leave these requests in supervisor holdouts, or otherwise on the work room floor." "The procedure required the supervisor receiving the request to return a signed and dated copy of the request to the Union steward. The procedure also required the receiving supervisor to enter the identifying information on a Request for Information log and to provide the information within 5 calendar days of the request. Union President Gene Gabaldon responded to the proposed procedure in writing and added only two additional provisions:

Upon receipt of the request form, the supervisor shall provide the information at the time requested when it is readily available. The supervisor shall annotate on the request form the information provided and both parties shall initial. Information not readily available will be sent to the Union via certified mail.

Nothing here shall waive any rights the Union may have to obtain information under the parties' Collective Bargaining Agreement or under the National Labor Relations Act, as amended.

As Labor Relations Specialist Karen Wheeler (herein Wheeler) testified, there was no indication that Gabaldon disagreed with the requirement that stewards hand the information request directly to the supervisor. Respondent submitted into evidence Wheeler's request for information log for 2003.

3. The Union's August 12, 2003 Information Request

On August 12, 2003 Trujillo filed a request for information seeking "copies of all weekly work schedules for all Pay Locations, all Tours at the ASF Facility. (Weekly work schedules) P/L 537, 538, 539, 518, 527, 528, and 529." Trujillo also requested copies of "each OTDL" for the same Pay Locations for "Pay Periods 17, 18, 19 weeks 1 and 2." Trujillo testified that he requested this information to determine if there was an overtime violation for the Albuquerque Auxiliary Service Facility, also identified as the ASF facility. Trujillo recalled that he submitted the request to Wheeler as well as to ASF Manager Nathaniel Baines. On August 28, Baines approved the request. Trujillo testified that as of the date of the hearing, he had received the requested documents for only four of the pay locations and for only one week of the pay periods that he had requested. He also testified that because he had not received all of the requested information, he had not been able to complete his grievance investigation and the matter was still pending. Trujillo recalled that during second-step grievance meetings in November or December, he mentioned to Wheeler that he had not received the information. She responded that she was having difficulty obtaining the material.

Wheeler's Request for Information log reflects that the information in response to Trujillo's August 12 request was provided on September 25. Wheeler testified that she entered this date on the log based upon the assurances from Baines that the information had been provided. Respondent also submitted into evidence Respondent's copy of the August 12 request that contained Wheeler's approval of the request and dated August 20. Wheeler testified that she was never informed by the Union in a follow-up letter or in later discussions that not all of the information had been provided in response to the request.

[11] Martinez is now the Postmaster for the city of Dallas. Paul Nistler holds the position of Plant Manager.

Baines testified that when he receives a request for information, it is usually his practice to give the request to Ruth Vassaw, a clerk in his office. If he doesn't have time to collect the information, he asks Vassaw to do so. While individual supervisors may also respond to the requests for information, Vassaw is primarily the individual who prepares the responses. Baines explained that while requested information was previously provided to the Union by regular mail, Respondent now sends the information by certified mail as well. He acknowledged however, that he was not sure whether the information was sent by certified mail as well as regular mail in August or September. Baines testified that the Union never informed him that it had not received all of the information.

As a clerk in the ASF, Ruth Vassaw is a member of the union. A part of her job involves collecting information covered by union requests for information. Vassaw testified that she was responsible for collecting the information covered in the Union's August 12 request for information. She testified that at the time of the request, it was her practice to send the information to the Union by inter-office envelope. She acknowledged however, that she had no specific recollection of gathering this material.

4. The Union's August 15, 2003 Information Request

By letter dated August 15, 2003 Trujillo informed Wheeler that the Union had submitted five previous requests for information on various dates in April and May and no information had been provided thus far. Trujillo attached a copy of a May 6 request seeking:

Copies of all information pertaining employee: Sanchez, Gabe concerning the payment of Hours in which he was denied access to the work room floor. Phil Benavidez (ASDO)(Arsenio Lovato) AMDO. Also can you contact Ms. Sue Jacobi concerning the same issue dealing with employee: Sanchez, Gabe (union wants copies of all c.c. mail to Ms. Jacobi. Also to request from Ms. Jacobi to have employee: Sanchez, Gabe Medical Records returned from the OWCP in Dallas for Review and Copies. (Under the Freedom of Information Act (ASM) Manual 352.4 Availability of Records.

Trujillo's August 15 letter also included a June 12 request seeking copies of information concerning SPBS Tour-3:

Copies of the Weekly work schedules for P/L 377 (PP 1 thru PP13) 2003 Copies of employee Moves reports for Codes (52) (53) same times as requested PP. 1 thru PP. 13 clerk craft employees only. Copy of the Work Hour Comparison Reports for SPBS Tour-3. Copy of the Mail Volume reports for last (6) Months SPBS T-3

Trujillo testified that he submitted the May 6 request for information to determine why Sanchez was sent home for unavailability of work. He submitted the June 12 request to determine whether there had been an overtime violation in relation to the usage of a small parcel distributor machine also identified as an SPBS machine on Tour 3. Trujillo initially testified that he never received the information included in either the May 6 or the June 12 requests. On cross-examination however, he admitted that James Billings provided to him e-mails that were sent to supervisors concerning this matter. Trujillo maintained however, that not all of the information that he requested was provided and that he continued to inform Wheeler of the insufficiency of the information during ongoing grievance meetings.

While James Phillip Billings is currently detailed as an Albuquerque District Security Control Officer, he previously served as a supervisor in Distribution Operations. Billings recalled receiving the Union's May 6 request for information. He explained that it had been referred to him for a response because it involved one of the employees under his supervision. Billings confirmed that in response to the request, he downloaded the e-mail messages concerning employee Sanchez and what was being done to get pay for the employee. Respondent submitted into evidence the request for information log showing receipt of Trujillo's request on May 7. The log also reflects that the information was provided to Trujillo on May 14.

Billings testified that while Trujillo's May 6 letter also included a request for Sanchez's medical records, these records were not provided to Trujillo. Billings recalled that he explained to Trujillo that the requested information could not be provided because it was confidential and was maintained by the Occupational Health Nurse. Billings confirmed that the Union never provided a release of information for the medical records.

5. The Union's September 10, 2003 Request for Information

On September 10, 2003, Trujillo submitted a request for information seeking documents and/or witnesses for pay periods 19 and 20 weeks 1 & 2:

> Copies of weekly work schedules, Overtime desire list, for <u>all</u> Pay locations and <u>all</u> Tours at the ASF facility. (P/L 537, 538, 539, 518, 527, 528, and 529.)
>
> Copies of Employee Moves reports for <u>all</u> above Pay locations for operations (Code 52 (52) (53)(43) for Clerk-Craft employees only.)
>
> List of all employee clocked into operation codes (324-38) (134-38)(137-37) (120-38) For the week of September 7th thru September 12 2003. Also I would like a copy of the list compiled by Acting SDO Bridgett Romero, in which all employees whom were required/mandated to perform overtime at the ASF facility for the week of September 7th thru September 12. (or similar list of employees not assigned to the ASF Facility.)
>
> Copy of c.c. message from Paul Nistler as per Management mandating all non-OTDL employees to 10 hours and OTDL employees 12 hours at the ASF Facility.

Trujillo faxed a copy of the request to Nathaniel Baines; Manager of the ASF and to Peter Baca, Rose Griego, and Charles Maggart who were the supervisors on all three different tours of duty at the ASF. Trujillo testified that he also sent a copy of the request to Wheeler. Trujillo requested the information because he perceived there to be an ongoing violation for staffing and overtime distribution at the ASF facility. Trujillo testified that in January 2004, he received the requested information for Pay Locations 537, 538, 539 and 518 and he re-

ceived the copy of the c.c. message from Paul Nistler.[12] He testified that the remainder of the information in the September 10 request described above had not been provided as of the time of the hearing. He testified that the information was requested because of grievances that he had filed concerning overtime as well as crossing crafts the use of casual employees.

Baines testified that he received Trujillo's request and he directed the request to Vassaw to collect the requested information. Baines asserted that to the best of his knowledge all of the requested information was provided to the Union. Vassaw testified that she assisted Baines in responding to this request for information. Respondent provided the worksheet completed by Vassaw in response to the Union's September 10 request. The document contains Vassaw's notation that the material was provided to Trujillo on September 28.

6. The Union's Request for Information on October 6, 2003

On October 6, Trujillo faxed a request for information to Wheeler, Baines, Maggart and Paul Nistler; Senior Plant Manager for the Albuquerque plant. Trujillo explained that the faxes were sent shortly after 2:00 a.m. because those were the normal hours that he worked at that time. Trujillo testified that he requested the information described in the October 6 letter because he believed that because an SPBS machine had been moved from the main plant to the ASF facility, there might have been overtime or crossing craft violations. In his request, Trujillo requested eight categories of information contained in various lists, forms, and notes. Trujillo testified that the requested information related to three different grievances. While two of the three grievances have since been resolved, none of the information included in the October 6 request was ever provided to him.

Vassaw testified that she assisted Baines in responding to this request and she specifically recalled gathering the information. As was her practice, she would have sent the information to the Union using an inner-office envelope.

On October 6, Trujillo also faxed a second request for information to Maggart, Baines, and Wheeler. In the request, Trujillo requested:

> Copies of the Last Quarter (and Current Quarter) of Section OTDL list for the ASF Facility. Pay Locations 527, 536, 537, (July thru Sept.) (Oct thru Dec) all for 2003.
>
> List lf All employees whom are called in on a Daily Basis for Overtime on the SPBS, Priority Mail and Mail Prep. Operations. (Rotations) List of Equitable distributions. From Pay Periods 20 week to current. (Please also provide on going until end of year 2003).

Trujillo testified that he requested the information for his investigation of a grievance related to an overtime violation. At trial, Trujillo testified that he had never received any of the information contained in this second October 6 request. He admitted that while he had not checked later to determine if the faxes were received, he also left hard copies of the requests in the recipients' in-boxes or in the inter-office mail. At the beginning of the trial, Counsel for the General Counsel amended the complaint to allege that from October 6, 2003 to January 14, 2004, Respondent delayed in providing:

Copies of the last Quarter (and Current Quarter) of Section OTDL list for the ASF Facility. Pay Locations 527, 536, 537 (July thru Sept.) (Oct thru Dec.) all for 2003.

Vassaw testified that she was sure that she had assisted Baines in responding to this second October 6 request for information. She recalls that, as with other information requests, she would have pulled the information and sent it to the Union by inner-office envelope.

7. The Union's Request for Information on November 5, 2003

On November 5, Trujillo faxed a copy of an information request to Jim Mercurio; Manager of Labor Relations as well as to Wheeler. He acknowledged however, that he did not have a fax receipt verifying the fax. He testified that he might have also left a hard copy of the request in Wheeler's internal hold-out or mailbox. In the written request, Trujillo requested the identity of the individual or individuals who were assigned to conduct an investigation in the Union's allegation of a Hostile Work Environment by a named supervisor in the plant. Trujillo also requested a copy of the latest policy concerning sexual harassment as well as information concerning the anticipated time period for the investigation and copies lf all protocols for dealing with such a complaint. Trujillo testified that he requested this information for his investigation of a possible grievance concerning this matter. Trujillo asserted that he never received the requested information.

The November 5 written request included the caption: "Second Request Submitted to Karen Wheeler." Wheeler testified that while she had received the first request from Trujillo, she had not received this November 5 second request. She recalled that the first request went to Plant Manager Paul Nistler and he entered it in his request for information log. She explained that if she ever receives a request identified as a second request, she always double checks to verify the response to the first request. Wheeler testified that when Trujillo made the first request for this information, she prepared a letter the same day and gave it to Nistler to provide to the Union. Respondent submitted into evidence a copy of the October 18 letter that was signed by Nistler and addressed to Trujillo.

E. Analysis and Conclusions Concerning 8(a)(5) Allegations

In a recent decision involving the United States Postal Service,[13] the Board quoted from *Asarco, Inc*., 316 NLRB 636, 643 (1995), enfd. in relevant part 86 F.3d 1401 (5th Cir. 1996): "In dealing with a certified or recognized collective bargaining representative, one of the things which employers must do, on request, is to provide information that is needed by a bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967)." In its decision, the

[12] Counsel for the General Counsel moved to amend the complaint at trial to allege that from September 10, 2003 until January 22, 2004, Respondent delayed in producing the requested information.

[13] *United States Postal Service*, 337 NLRB 820, 822 (2002).

Board also referenced its earlier decision in *Ellsworth Sheet Metal,* 224 NLRB 1506 (1976), in pointing out that following an appropriate request, and limited only by considerations of relevancy, the obligation arises from the operation of the Act itself.

Repeatedly Trujillo testified that his information requests were for purposes of determining whether to file a grievance or for purposes of investigating and processing grievances previously filed. It has been clearly established that processing grievances is a union's responsibility and an employer must provide information requested by the union for the purposes of handling grievances. *TRW, Inc*., 202 NLRB 729 (1973). In *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1965), the Supreme Court held that the duty to bargain in good faith imposes an obligation to furnish relevant information needed by a union for effective administration of an existing contract and the processing of grievances. The Court also concluded that this duty includes information requested having "potential" relevance to the union's evaluation of the prudence in pursuing a contractual claim against an employer. Id at 436-438. It is also noteworthy that the Board, in determining that information is producible, does not pass on the merits of the grievance underlying a request nor is it necessary for the union to demonstrate that the basis for the request is accurate, nonhearsay, or even ultimately reliable. *W.L. Molding Co*., 272 NLRB 1239, 1240 (1984). Inasmuch as the Board uses a liberal discovery-type standard in evaluating requests for information, it is apparent that Trujillo's requests were arguably relevant and necessary for the processing of union grievances and the administration of the collective bargaining agreement. *Brazos Electric Power Cooperative, Inc*., 241 NLRB 1016, 1018 (1979). Additionally, Respondent makes no assertion that any information was denied the Union because of relevancy or privilege. The only information that Respondent acknowledges that it knowingly failed to produce related to a question of confidentiality.

Trujillo asserts that Respondent either failed to provide information in response to his requests or delayed in providing the requested information. Respondent denies this allegation and contends that the information was provided. Respondent presented a number of individuals who testified concerning the procedure for responding to the Union's requests for information and who asserted that the information was gathered and provided to the Union in accordance with those procedures. Overall, I found these witnesses credible. There was no evidence of any intent or conspiracy to withhold information from the Union. It is ironic that the crux of the problem in providing the information may in part be due to the inefficiency of the inner-office mail delivery system utilized by the parties and the failure of the parties to adhere to the 2001 procedure that was instituted to prevent problems in responding to information requests.

There is no dispute that Plant Manager Martinez promulgated a procedure for both parties to follow for union requests for information. Wheeler testified without contradiction that Union President Gabaldon reviewed the proposed procedure and added two additional requirements. If followed, the final procedure mandated that the union steward give the request for information directly to the supervisor and not simply leave it for the supervisor to find. The supervisor providing the information to the union was required to mail the information to the Union via certified mail. The record reflects however, that neither party followed the procedure as proposed. Trujillo either faxed his requests to supervisors or left the requests in their holdout or inboxes. There is no dispute that during the time period in issue, Respondent sent the information to the Union in the inner-office mail rather than by certified mail.

1. The August 12 Request for Information

There is no dispute that Respondent received and approved Trujillo's August 12 request for information. Based upon assurances from Baines that the information was provided to the Union, Wheeler noted on her request for information log that the information was provided to the Union on September 25. Both Baines and Vassaw confirmed that this information would have been collected and forwarded to the Union using the normal procedures. While Vassaw testified that she assisted Baines in collecting this material, she had no specific recollection of gathering this material. Vassaw also explained that she might not always be the only person who is gathering information in response to a request for information. If a supervisor is also collecting information, the information may be sent to the Union without her involvement. There is no dispute that part of the information in the August 12 request was provided to the Union. While I have no reason to believe that Respondent intended to deny the remaining information to the Union or was even aware that it had not been provided, there is simply insufficient evidence to show that all of the requested information was provided.

2. August 15 Request for Information

In his August 15 request for information, Trujillo attached his previous requests for information on May 6 and June 12. Billings testified that the information in response to the May 6 request was provided to Trujillo on May 14. Initially Trujillo testified that none of the information requested in the May 6 letter was provided to the Union. On cross-examination, however, he acknowledged that Billings provided a portion of the information. Billings testified without contradiction that he explained to Trujillo that the medical records included in this request for information could not be provided without the employee's release of information. Billings also testified without contradiction that no release was ever provided by the Union for these requested medical records. Counsel for the General Counsel argues in her brief that Respondent did not offer to bargain or offer the Union an accommodation to address any alleged confidentiality concerns. While the Union might be otherwise entitled to the disclosure of the requested information, the Supreme Court has recognized a limited exception for information that is confidential in nature. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 99 S. Ct. 1123 (1979). In *Detroit Edison*, the Court held that an employer did not violate the statutory duty to bargain in good faith by resisting an unconsented-to disclosure of individual employee aptitude test results to a union that was processing a grievance. The Court relied on three factors: (1) the sensitive nature of the information sought; (2) the minimal burden that a requirement of employee consent would impose on the union; and (3) the lack of evidence that

the employer had fabricated concern for employee confidentiality only to frustrate the union in the discharge of its responsibilities. Id. at 319-20. In the instant case, the request for a release from the employee in issue was reasonable and posed no undue burden on the Union. Thus, I find no evidence that Respondent unlawfully failed to provide the information identified in the May 6 request for information.

The second request for information attached to Trujillo's August 15 letter was a previous request for information dated June 12. Trujillo's copy reflects the request was approved by management and there is a small note written on the right side of the page. Trujillo testified that a yellow post-it note was affixed to the original information request form and signed by Carol Sutherland, a secretary for the tour three plant operations in downtown Albuquerque. The note states:

> Charlie, I just returned from AL tonight and found this in my holdout. It will probably still be a few days before Darlene can get the info to you.
> Carol S.

Neither Baines nor Wheeler testified concerning the production of information in response to the June 12 request. Wheeler's information request log reflects receipt of a request from Trujillo on August 25 concerning "2240's Gabe Sanchez." The log reflects that the information was sent to the Union on August 28. While the May 6th request dealt with employee Gabe Sanchez, there was no evidence to show that Respondent also provided information in response to the June 12 request.

3. September 10 Request for Information

Trujillo testified that in January, he received a portion of the information identified in the September 10 request for information. He denied that he ever received the remainder of the information. Vassaw credibly testified that she assisted Baines in collecting the information for this specific information request. She also provided a copy of her worksheet showing that she sent the information to Trujillo on September 28. While the record provides no explanation for the basis for such a discrepancy in the parties' recall, I found Vassaw to be a very credible witness. As evidenced above, she freely admitted that she had no specific recollection of gathering the information for the August 12 request. By contrast, she recalled that she assisted with the collection of documents for the September 10 request and she recorded it as sent to the Union on September 28. I credit her testimony that she provided the requested information. Again, it is ironic that the issue may be the flawed efficiency of Respondent's inner-office mail service. While the information may have be lost or erroneously redirected, there is not sufficient evidence to show that Respondent failed or refused to provide this information as requested.[14]

[14] In reaching this conclusion, I am not relying upon the administrative law judge decision cited and attached to Respondent's brief. Counsel asserts that it is offered in support of her assertion that "The Board stated that once management has given information it believes satisfied the union's request, the burden shifts to the union to complain regarding any inadequacies."

4. October 6 Requests for Information

There were two separate requests for information dated October 6. The complaint was amended at trial to allege that Respondent delayed in providing a portion of the information contained in one of the October 6 requests for information. Vassaw testified that she assisted Baines in collecting the information for both requests. As was her practice, she sent the information to the Union via the inner-office mail system. I find Vassaw to be a credible witness and there is nothing in the record to support a finding that she negligently, intentionally, or deliberately failed to provide the information as requested.

5. November 5 Request for Information

Wheeler testified that while she never received a copy of Trujillo's November 5 request for information, she was aware of the information requested. She credibly testified that when Trujillo first requested this same information, it was provided. Without contradiction, she testified that in response to the first request, she prepared the October 18 letter to Trujillo. Thus, the record reflects that Respondent provided the information as requested.

6. Summary

As discussed above, Respondent has not sufficiently demonstrated that it fully provided all of the information in response to the Union's August 12 request or the June 12 request for information that was later incorporated into the August 15 request. Contrastly, there is not sufficient evidence to show that Respondent failed to provide the information referenced in the Union's requests of May 6, September 10, October 6, and November 5. There is no dispute that Respondent was not following the procedures outlined in Martinez's November 2001 directive. There is also no evidence that the Union was following the procedure or that the Union protested Respondent's failure to provide the information by certified mail as required by the 2001 letter. In essence, the evidence shows that both parties were using a less than reliable method of making requests and responding to requests. While the ineffectiveness of the delivery system for information production may have prevented or delayed the Union's receipt of the information, it did not constitute a failure to provide or a delay in providing the information requested in the Union's requests of May 6, September 10, October 6, and November 5 in violation of Section 8(a)(5) of the Act. I do, however, find that Respondent's failure to provide all of the information requested on August 12 and the information requested on June 12 and incorporated into the later August 15 request to constitute a violation of Section 8(a)(5) of the Act.

F. The Necessity for Special Remedies

Counsel for the General Counsel asserts that a broad posting requirement is clearly appropriate in this case. She also argues that site-specific notice postings used in prior cases have not been successful in eliminating Respondent's recidivist pattern of refusing to provide information requested by collective-bargaining representatives of its employees. Counsel further argues that because Respondent has been shown to have a proclivity to violate the Act and because its unlawful conduct with respect to Orlovsky is so egregious and widespread, Respon-

dent has demonstrated a general disregard for employees' statutory rights. General Counsel additionally requests that the Board include broad injunctive language in its order, prohibiting the Respondent from engaging in "any other" unlawful conduct.

In support of her request for a broad remedial order and a district-wide posting, Counsel for the General Counsel asserts that Respondent has a long history of violating Section 8(a)(5) and (1) of the Act by failing to provide requested relevant information at many of its locations nationwide. Specifically, she cites the Board's recent decisions in *United States Postal Service*, 339 NLRB No. 150 (August 21, 2003) and *United States Postal Service*, 337 NLRB 820 (2002) as well as two other cases[15] in which Respondent entered into a formal settlement involving the Albuquerque facilities. Counsel for the General Counsel asserts that in this formal settlement, ultimately enforced by the Court of Appeals for the Tenth Circuit, Respondent agreed that it would not refuse or fail to provide, or delay in providing information to the Union that is necessary and relevant to the Union's performance of its representational duties.

In August 2003, the Board issued its decision in *United States Postal Service*, 339 NLRB No. 150 (2003), finding that Respondent failed and refused to provide relevant and necessary information in a timely manner to the National Association of Letter Carriers, AFL-CIO. Citing 12 previous Board decisions covering a span of time between 1985 and 2002, and involving postal facilities throughout the United States, the Board stated: "The Respondent has a history of violating Section 8(a)(5) and (1) by failing to provide requested relevant information at many of its locations over the past two decades." Because Respondent had shown a particular tendency to violate Section 8(a)(5) within its Houston district by failing to provide requested information, the Board found a district-wide posting appropriate. Specifically, the Board found that district-wide posting was necessary due to the Respondent's repeated violations in the district and the absence of any evidence that the Respondent had taken any affirmative steps to control its misconduct.

The Board in *Hickmott Foods*, 242 NLRB 1357 (1979), held that a broad cease-and-desist order requiring a Respondent to cease and desist from "any other manner" restraining or coercing employees in the exercise of their Section 7 rights rather than the narrow "in this or any like manner" language should be reserved for situations where a Respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. The Board went on to state that each case would be analyzed to determine the nature and extent of the violations committed by a respondent so that the Board might tailor an appropriate order. *Id.* at 1357.

In *United States Postal Service*, above at 2, the Board also found it appropriate to provide broad injunctive language in their order, barring the Respondent from engaging in any other unlawful conduct. Because Respondent had repeatedly refused to provide requested relevant information to the Union at many of its locations over a period of many years and because of Respondent's recalcitrance on this issue, a broad order was found appropriate.

In the instant case, Respondent argues that a broad order is not required because the allegations in this case arise out of three separate facilities, which are contained at one location; the Albuquerque Main Post Office. Respondent argues "This small number of violations pales in comparison to the 12 post offices within Albuquerque district that were not part of this complaint." Respondent also argues that "incidents at only three facilities at one singular location, by a handful of employees, in the entire Albuquerque area do not rise to the level of egregious and widespread misconduct that a broad order is meant to remedy."

There is no evidence of a similar pattern of violations affecting other postal facilities in the Albuquerque district. The record reflects that the unfair labor practices relating to a failure to provide requested information found herein involve requests for information filed by Craft Director Charles Trujillo with respect to the postal facilities within the city of Albuquerque. I also note that the formal settlement in Cases 28-CA-17383(P) and 28-CA-17405(P) required only a posting in three facilities in Albuquerque. Accordingly, a notice posting limited to the facilities within the city of Albuquerque should be sufficient to remedy the violations and I shall not recommend a district-wide posting. See *United States Postal Service*, 341 NLRB No. 94, slip op. at 15 (2004).

While I do not find the necessity for a district-wide posting, I nevertheless find the need for a broad remedial order. Not only has the Board found Respondent to have a proclivity to violate the Act involving the failure to provide or the delay in providing requested information, but Respondent has agreed by virtue of a formal settlement, that it would not refuse to provide or delay in providing requested information or in any other manner interfere with its employees' Section 7 rights. It is especially significant that the formal settlement specifically involved Respondent's actions toward its employees at the Albuquerque facilities. Accordingly, I recommend that a broad order issue in this matter.

CONCLUSIONS OF LAW

1. The United States Postal Service is now, and at all times herein, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The American Postal Workers Union, Local No. 380 AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with unspecified reprisals because of their activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

4. By denying John Orlovsky's request for union representation during a discussion that he reasonably believed might result in discipline, Respondent violated Section 8(a)(1) of the Act.

5. By refusing to permit John Orlovsky to speak with his union representative prior to an investigatory interview that he

[15] The cases are identified as 28-CA-17383(P) and 28-CA-17405(P).

reasonably believed would result in disciplinary action, Respondent violated Section 8(a)(1) of the Act.

6. By failing to inform John Orlovsky and his union representative of the specific charges that were to be discussed during an investigatory interview that Orlovsky reasonably believed would result in disciplinary action, Respondent violated Section 8(a)(1) of the Act.

7. By threatening employees that Respondent discharged John Orlovsky because of his activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

8. By requiring John Orlovsky to participate in an official discussion on September 5, 2003, Respondent violated Section 8(a)(3) and (1) of the Act.

9. By requiring John Orlovsky to participate in fact-finding meetings on September 9, 2003, October 16, 2003, and December 4, 2003, Respondent violated Section 8(a)(3) and (1) of the Act.

10. By issuing a letter of warning to John Orlovsky on September 11, 2003, Respondent violated Section 8(a)(3) and (1).

11. By issuing a 7-day suspension to John Orlovsky on November 20, 2003, Respondent violated Section 8(a)(3) and (1) of the Act.

12. By issuing a 14-day suspension to John Orlovsky on November 26, 2003, Respondent violated Section 8(a)(3) and (1).

13. By placing John Orlovsky on administrative leave on December 4, 2003, Respondent violated Section 8(a)(3) and (1) of the Act.

14. By discharging John Orlovsky on January 29, 2003, Respondent violated Section 8(a)(3) and (1) of the Act.

15. By failing and refusing to provide the Union with all of the information it requested on August 12, 2003 and June 12, 2003 and resubmitted on August 15, 2003, as found herein, said information being relevant and necessary to the Union as the collective bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily disciplined and discharged John Orlovsky, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having failed and refused to provide the Union with all of the information it requested on August 12, 2003 and having failed and refused to provide the Union with certain information it requested on June 12 and again on August 15, it must promptly supply said information.

Because the Respondent has a proclivity for violating the Act, (see, e.g., *United States Postal Service*, 339 NLRB No. 150 (August 21, 2003), and because of the serious nature of the violations, I recommend issuance of a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[16]

ORDER

The Respondent, United States Postal Service, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with unspecified reprisals because they engaged in union or protected activity.

(b) Denying employees union representation during a discussion they reasonably believe may result in discipline.

(c) Refusing to permit an employee to speak with his or her union representative prior to an investigative interview that the employee reasonably believes may result in disciplinary action.

(d) Failing and refusing to inform an employee and his or her union representative of the specific charges that are to be discussed during an investigative interview that the employee believes will result in disciplinary action.

(e) Threatening employees that they will be discharged for their protected or union activities.

((f) Disciplining employees because of their protected or union activities.

(g) Discharging employees because of their protected or union activities.

(h) Refusing to bargain collective with the American Postal Workers Union, Local No. 380, AFL-CIO by failing and refusing to provide requested information that is relevant and necessary to the Union as the collective bargaining representative of those Unit employees described in the existing collective bargaining agreement and found appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(i) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2.Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from this Order, offer John Orlovsky full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. Make John Orlovsky whole for any loss of earnings and any other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and discipline issued to John Orlovsky, and within 3 days thereafter notify

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

John Orlovsky in writing that this has been done and that the discipline and the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Albuquerque, New Mexico facilities, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 5, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has take to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten our employees with unspecified reprisals because they engage in activities in support of the American Postal Workers Union, Local No. 380, AFL-CIO, or any other union.

WE WILL NOT deny our employees union representation during a discussion they may reasonably believe to result in discipline.

WE WILL NOT deny our employees an opportunity to consult with their union representative before participating in an investigative interview that an employee may reasonably believe to result in disciplinary action.

WE WILL NOT refuse to inform our employees and their union representative of the specific charges to be discussed in an investigative interview that an employee reasonably believes to result in disciplinary action.

WE WILL NOT threaten our employees that they will be discharged because of their activities in support of the American Postal Workers Union, Local No. 380, AFL-CIO, or any other union.

WE WILL NOT issue a letter or warning, suspend, or otherwise discipline our employees for engaging in activities in support of the American Postal Workers Union, Local No. 380, AFL-CIO, or any other union.

WE WILL NOT discharge our employees for engaging in activities in support of the American Postal Workers Union, Local No. 380, AFL-CIO, or any other union.

WE WILL NOT refuse or fail to provide and furnish information to the Union that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer John Orlovsky full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other right or privilege previously enjoyed.

WE WILL make John Orlovsky whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date o the Board's Order, remove from our files any reference to John Orlovsky's unlawful discipline and discharge, and WE WILL within 3 days thereafter, notify him in writing that this has been done and that the discharge and discipline will not be used against him in any way.

WE WILL promptly furnish the Union with any remaining information that has not otherwise been provided in response to the Union's written information requests on August 12, 2003 and on June 12 that was later included in a request on August 15, 2003.

UNITED STATES POSTAL SERVICE

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."